



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** James M. Simons - Claim for Damages to Land -  
Corps of Engineers Waterway Project  
**File:** B-243670  
**Date:** November 5, 1991

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## DIGEST

A property owner claims that flooding caused by a hydroelectric plant constructed as part of an Army Corps of Engineers water diversion project has destroyed the value of his land. The owner has not established a claim under the Fifth Amendment's "taking" clause because the project was a legitimate exercise of the government's dominant servitude over navigable waterways under the Commerce Clause. The government's dominant servitude applies to the entire area below the ordinary high water mark of the waterway, within which this land lies, and the hydroelectric plant is an appropriate collateral project to the water diversion.

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## DECISION

Mr. James M. Simons appeals our Claims Group settlement, Z-2866768, April 12, 1991, denying his claim for \$55,000, which, Mr. Simons states, represents the property value he has lost because of an Army Corps of Engineers (Corps) water diversion project. For the reasons stated below, the Claims Group's settlement is affirmed.

## BACKGROUND

This case arose out of the Corps' Cooper River Diversion Project, located near St. Stevens, South Carolina. In 1942, to generate hydroelectric power and provide a navigation channel to Columbia, the state of South Carolina diverted a substantial part of the Santee River's flow into the nearby Cooper River. A side effect of the 1942 project was increased shoaling in Charleston Harbor, into which the Cooper empties. The increased shoaling became a serious problem to navigation, and, to alleviate the problem, Congress authorized the Corps of Engineers to undertake the diversion project to restore the flow of the two rivers to approximately their pre-1942 levels. As part of the project, the Corps constructed a canal to carry the diverted water to the Santee River. Because the

rediversion would reduce the flow to the preexisting hydroelectric power plant, reducing its power production capacity, as part of the project the Corps constructed a new power plant on the diversion canal to compensate for the lost generating capacity. The state of South Carolina operates the new power plant.

The project was completed and began full operation in 1985. In 1988 Mr. Simons purchased for \$55,000 approximately 277 acres of swamp land lying between and abutting both the Santee River and the rediversion canal. In February 1989 Mr. Simons filed a claim with the Corps of Engineers in the amount of \$55,000 on the basis that the rediversion project effected a taking of his property without just compensation in that his property floods whenever the canal's water level is raised to serve the power plant, and this has rendered his property valueless.<sup>1</sup>

The Corps acknowledges that Mr. Simons's property is subject to more flooding than immediately prior to the rediversion, but argues that the frequency of flooding and the water levels are no greater than they were before 1942, when the rivers flowed in their natural states. To support its position, the Corps included in the record their own study, dated September 15, 1989, of the frequency of flooding at various elevations on the property before 1942, during the intervening period of the diversion, and after the rediversion project. That report shows that at each of the elevations studied, the frequency of flooding is less since the Corps completed the rediversion project in 1985 than before 1942. For example, at the highest elevation studied, 20 feet, the property had been flooded 35 percent of the time before 1942, and subsequent to the rediversion it is projected to be flooded 22 to 34 percent of the time.<sup>2</sup> It is the Corps' position that the current flooding must be compared to the natural state of flooding (pre-1942) rather than the reduced flooding created by the 1942-1985 diversion

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<sup>1</sup>Mr. Simon asserted his claim by filing suit in the United States Claims Court in November 1989. However, the parties agreed to dismiss that suit and to allow the administrative consideration of the claim to proceed, as a result of which the claim was forwarded by the Corps to our Office.

<sup>2</sup>Since Mr. Simons purchased the property approximately three years after the completion of the rediversion project, the Corps claims he had notice of the condition of the property. Mr. Simons responds that the flooding occurs irregularly and, thus, was a hidden defect of which he was unaware. Because we are able to resolve this claim on its merits, we need not reach this collateral issue.

and, therefore, that there has been no taking of Mr. Simons's property as a result of the rediversion project.

Our Claims Group disallowed the claim, stating that under the government's constitutional power to regulate interstate commerce, it may undertake projects to improve navigation and the rediversion was such a project. Since the rediversion did not worsen conditions that would have occurred absent any manipulation by man, the Claims Group found there was no compensable taking.

In his appeal, Mr. Simons, through his attorney, argues that his property was damaged not as a result of restoring the flow of water in the Santee River to improve navigation, but as a result of the construction of a canal to generate power.

He also argues that the project did not restore the natural flow of the river because it has created conditions that would not have occurred absent any manipulation by man. In this regard he has argued that prior to the rediversion, his land was subject to flooding, but generally only at certain times which were to some extent predictable because of the likelihood of heavy rains at those times, while at other times the land was dry enough to be used for timbering and hunting, the purposes for which he purchased it. The operation of the power station on the rediversion canal, he argues, has caused his land to be flooded more frequently and less predictably, thus making the land useless for these intended purposes.

Both parties rely on the Constitution of the United States to support their positions. Mr. Simons alleges that the devaluation of his property is a "taking" under the Fifth Amendment, which requires the government to provide just compensation when private property is taken for public use. The Corps, however, relies on a judicially recognized exception that applies when the government exercises its powers under the Commerce Clause of the Constitution to regulate navigable waterways. U.S. Const. art. I, § 8, cl. 3.

#### ANALYSIS

Clearly, in certain circumstances government action resulting in the destruction of the value of privately owned land by flooding can be considered a "taking" to the extent of

the destruction caused.<sup>3</sup> See United States v. Kansas City Ins. Co., 339 U.S. 799, 809 (1950). The Supreme Court has held, however, that under the Commerce Clause the United States has a dominant or navigational servitude in the country's navigable streams, and the rights of the title holder in such streams are subordinate to the dominant power of the federal government in respect of navigation.<sup>4</sup> United States v. Chicago, M., St.P. & P.R. Co., 312 U.S. 592, 596 (1941). That power:

" . . . extends to the entire stream and the stream bed below ordinary high water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 703-704, (1987), quoting United States v. Rands, 389 U.S. 121 at 123 (1967).

If the damage complained of is at or below the ordinary high water mark, there is no taking under the Fifth Amendment. Also, the fact that the government may not have exercised its rights for many years would not affect its previously established navigational servitude extending to the stream's original high water mark. See e.g., United States v. 49.79 Acres of Land, 582 F. Supp. 368, 375 (D.C. Del. 1983); and United States v. Willow River Co., 324 U.S. 499, 509 (1944).

The courts have also held that although the government's power is inherently linked to the regulation of navigable waterways, the government need not limit its actions to those that improve navigation. Thus, it has been held:

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<sup>3</sup>The effective expropriation of private property by the sovereign acting indirectly without formal eminent domain proceedings is termed inverse condemnation. See Schultz v. United States, 5 Cl. Ct. 412, 415 (1984).

<sup>4</sup>In this case, although the matter is not in question, the waters involved (Charleston harbor and the Cooper and Santee Rivers) appear to be appropriately classified as navigable, as that term is applied under the Commerce Clause. See e.g., the Corps of Engineers definition in 33 C.F.R. Part 329 (1990).

"The fact that collateral purposes other than navigation will also be served does not invalidate the exercise of the authority conferred, even if those other purposes, standing alone, would not have justified an exercise of legislative power." United States v. 49.79 Acres of Land, 582 F. Supp. 368, 374 (1983), quoting Arizona v. California, 283 U.S. 423 (1931).

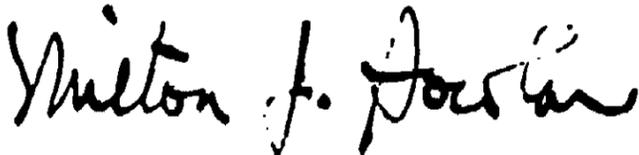
Applying these rules to Mr. Simons's case, we find that the Cooper River Rediversion Project clearly was an exercise of the government's power over navigable waters pursuant to the Commerce Clause. The act authorizing the project specifically established the project "for navigation, flood control and other purposes . . ." Pub. L. No. 90-483, § 101, 82 Stat. 731 (1968). The record indicates the primary purpose of the project was to reduce shoaling in Charleston harbor by reducing the flow into the harbor from the Cooper River, and the rediversion canal accomplishes this purpose by rediverting the flow from the Cooper to the Santee. The record also indicates that the hydroelectric plant constructed on the canal was to compensate the state of South Carolina for the loss of preexisting hydropower capacity due to the rediversion of the water and was, therefore, clearly related to the primary purpose of the project. While perhaps, as Mr. Simons argues, had it not been decided to build the hydroelectric plant, the rediversion could have been accomplished in some way other than by construction of the canal, as noted above, the government may engage in collateral activities incident to exercising its authority over navigable waterways provided there is some nexus to navigation, which is the case here.

As to Mr. Simons's argument that the Corps created conditions that would not have occurred absent any manipulation by man, the Corps acknowledges that Mr. Simons's property is subject to frequent flooding, but insists that the flooding is below the historical levels and no more frequent than existed before the state diverted the Santee River in 1942. That is, prior to the diversion in 1942, what is now Mr. Simons's land was below the ordinary high water mark of the Santee and was frequently flooded. Mr. Simons has submitted no evidence to rebut the evidence provided by the Corps, but merely argues that the land is more frequently flooded now than it was before the rediversion was completed in 1985.

Based on the record before us, we accept the Corps' finding that the flooding caused by the rediversion project does not

exceed the ordinary high water mark of the Santee River prior to 1942. Thus, while the property enjoyed reduced flooding during the 1942-1985 period when water was artificially diverted from the Santee to the Cooper, it remained subject to the government's dominant servitude, which was not lost because of the diversion during that period. Therefore, although it now floods more often than it did during the 1942-1985 period, that does not provide a basis for us to allow Mr. Simons's claim.

Accordingly, the Claims Group's disallowance of the claim is affirmed.

  
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